

Working Effectively with Tribal Governments: Successful Intergovernmental Collaborations Between Tribes and Federal, State, and Municipal Governments



2008 SAIGE Annual Training Conference

"Blessed by Tradition: Honoring Our Ancestors Through Government Service"

Monday, June 02, 2008 - Friday, June 06, 2008
Grand Traverse Resort, Acme, MI

Shana Greenberg Barehand
Tribal Liaison, Office of Intergovernmental Affairs
Federal Communications Commission (FCC)
Indian Telecommunications Initiatives (ITI)
<http://www.fcc.gov/indians/>

Luke Jones
Director, Indian Environmental Office
U.S. Environmental Protection Agency
Region 5 Chicago
<http://www.epa.gov/tribalportal/>

1

Session Overview

- Why Highlight Intergovernmental Collaborations with Tribes?
- Overview of Indian Country & Federal Indian Policy
- Summary & Recommendations:
Factors for Successful Intergovernmental Administration Involving Tribes

2

Why Highlight Intergovernmental Collaborations with Tribes?

American Federalism

Marble Cake Or Layer Cake?



Marble Cake Federalism is based on a pragmatic mixing of authority and programs among the national, state, and local governments.

Layer Cake Federalism is based on a clear delineation of authority and programs among the national, state, and local governments.

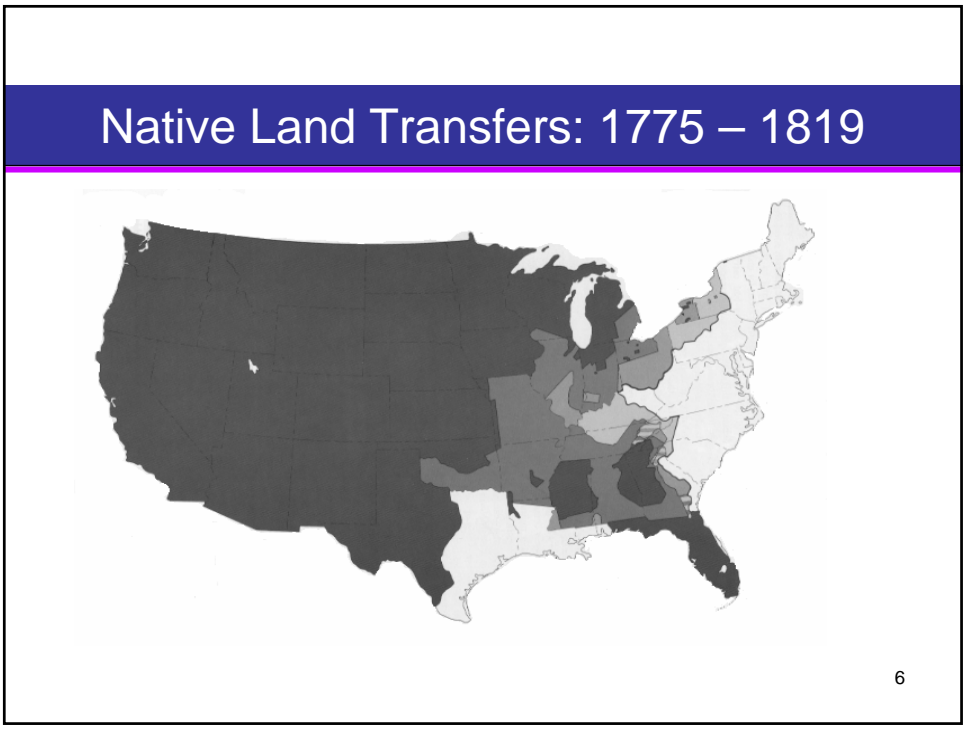
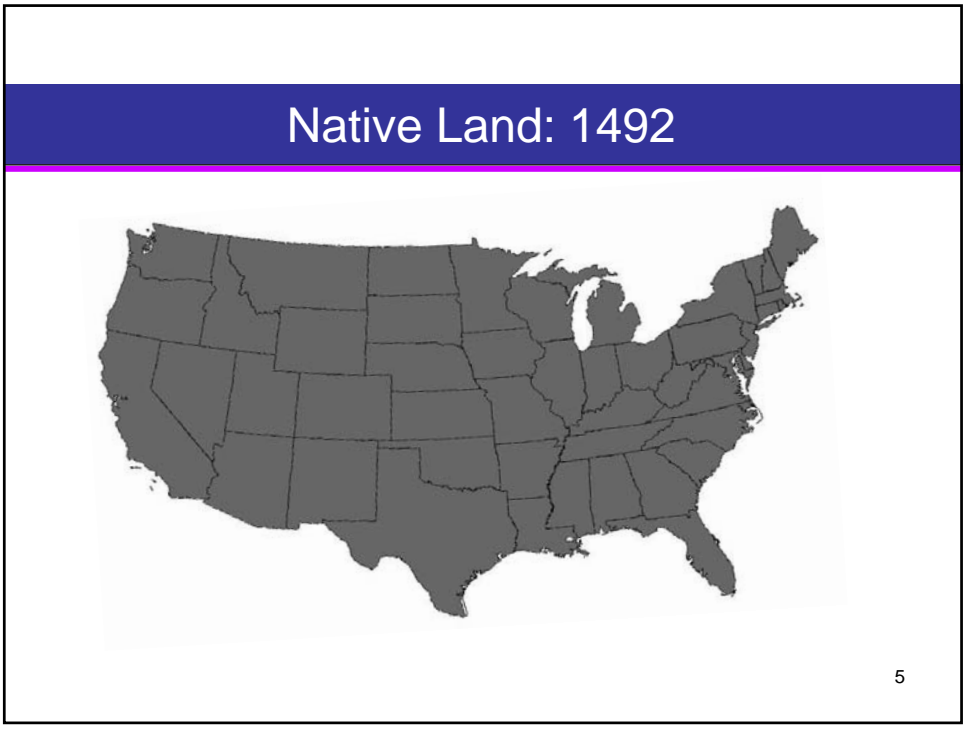
What's Missing? Traditional models of American Federalism, like the ones presented above, ignore tribal governments. The field of Public Administration must train practitioners and help direct scholarship to a greater awareness of tribal governments and their role in the American political system.

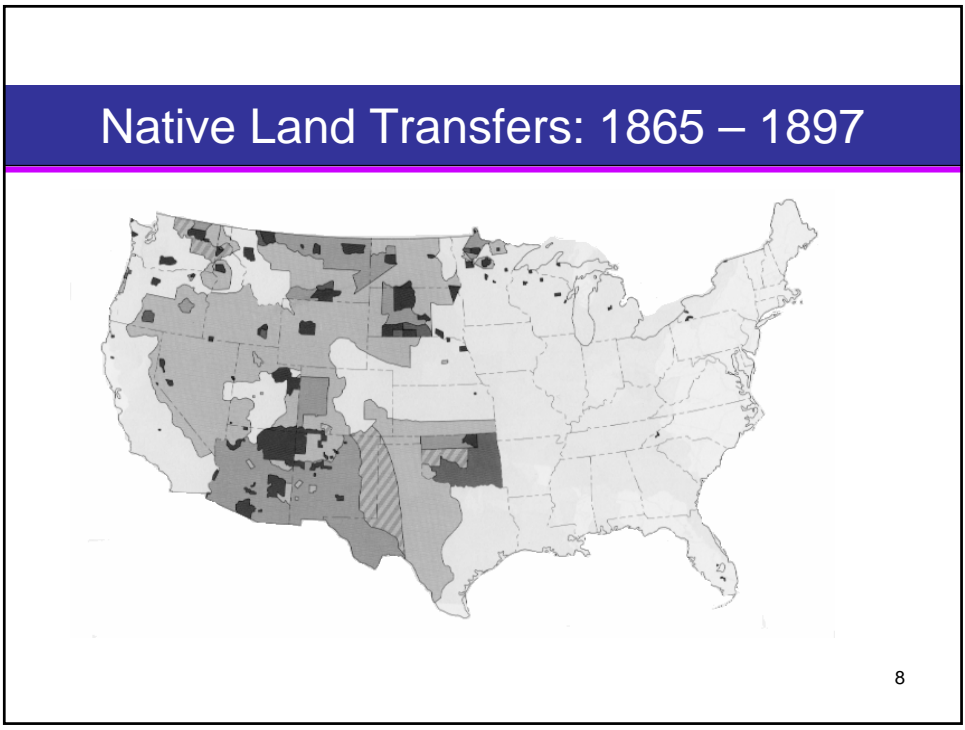
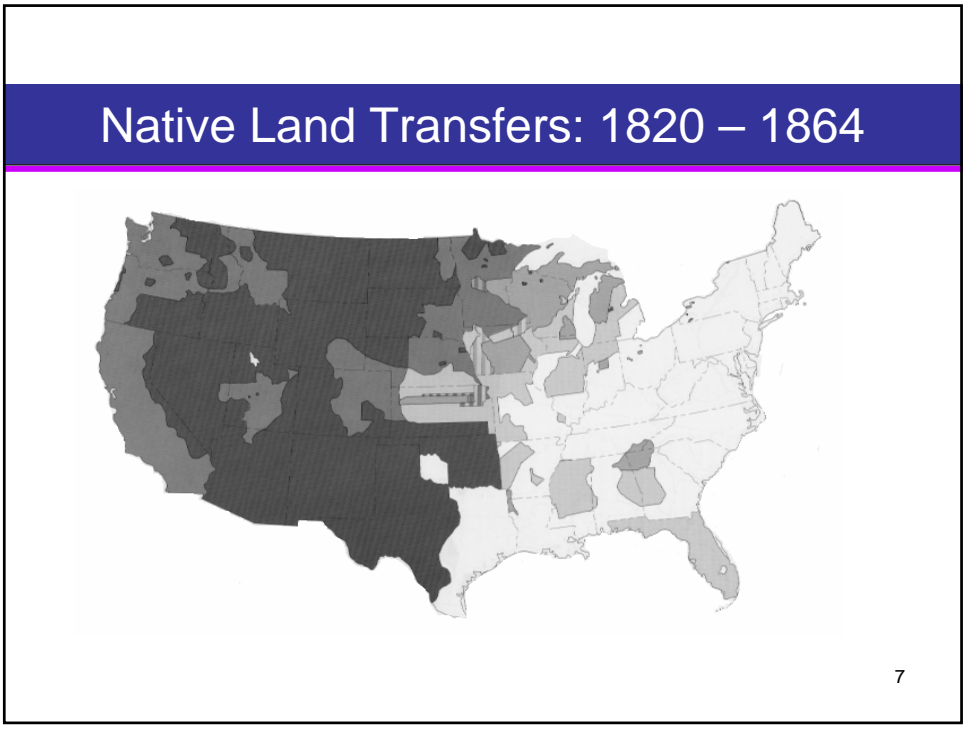
3

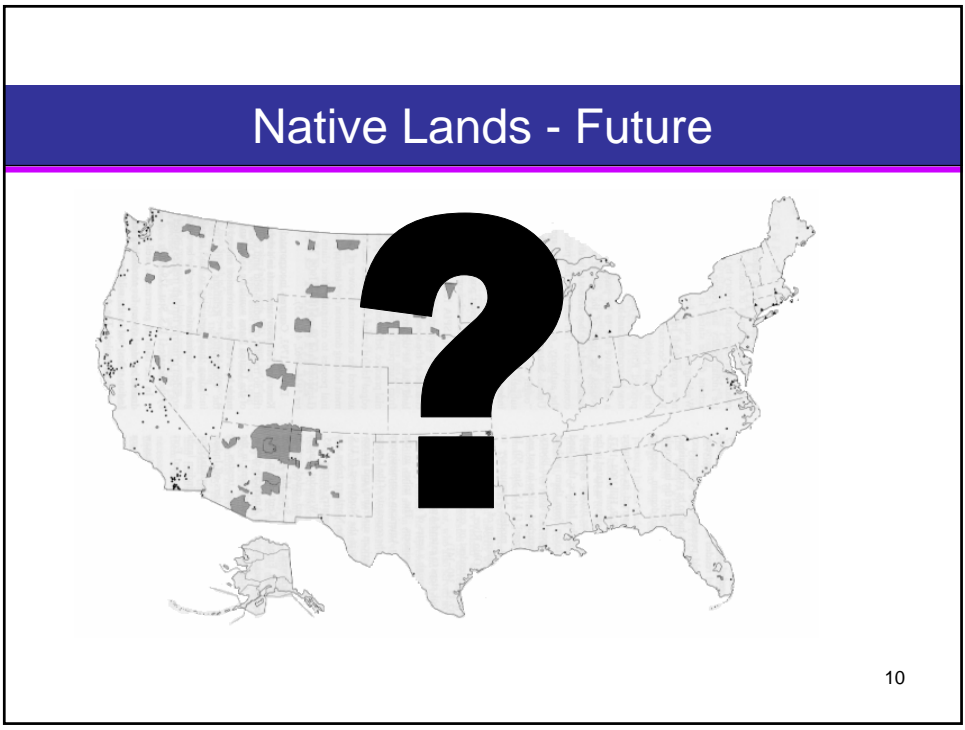
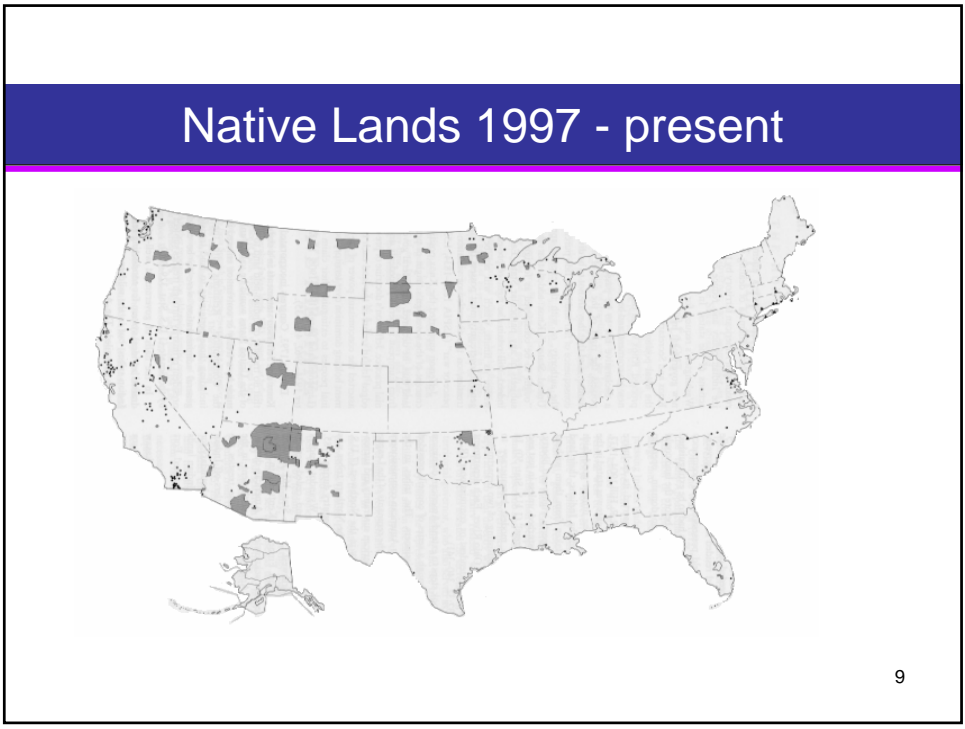
Factors for Successful Intergovernmental Administration Involving Tribes

- 1) Respect Tribal Sovereignty & Jurisdiction
- 2) Acknowledge Off-Reservation Tribal Rights
- 3) Negotiate Intergovernmental Agreements
- 4) Train Federal, State, Local, and Tribal government Employees on Intergovernmental Administration

4







Some Definitions

- **American Indian Tribe**

- Any Indian Tribe, Band, Nation, Pueblo or other organized group or community, including any Alaska Native entity, which is recognized as eligible for the special programs and services provided by the United States to Indian Tribes because of their status as Indians
- A list is published annually in the Federal Register indicating the Federally recognized tribal entities

- **American Indian**

- Conceptually: Has an ancestor who lived in North America prior to the arrival of the first Europeans, and is regarded as an Indian by his/her tribe or community (e.g., through enrollment)
 - *Note: The Bureau of the Census relies on self-reporting; anyone who identifies themselves as American Indian/Native Alaskan is counted as such, regardless of whether they are enrolled as a member in a Federally-recognized Indian Tribe.*
- For Most Federal Agencies: A person who is an enrolled member of any Federally-recognized Indian Tribe or a descendant of an enrolled tribal member

11

What is Indian Country?

Indian country is defined in federal law to mean reservations, allotments and dependent Indian communities.

- There are 562 federally-recognized tribal governments (~229 in AK).
- Land base totals over 70 million acres, reservations vary in size from less than 10 acres to more than 14 million acres.
- There are over 2.4 million American Indian/Alaska Natives.¹
- Poverty and unemployment rates are 3 times greater than the national average.
- 36% of the population over the age of 25 do not have high school diplomas compared to 19.6% nationally.¹

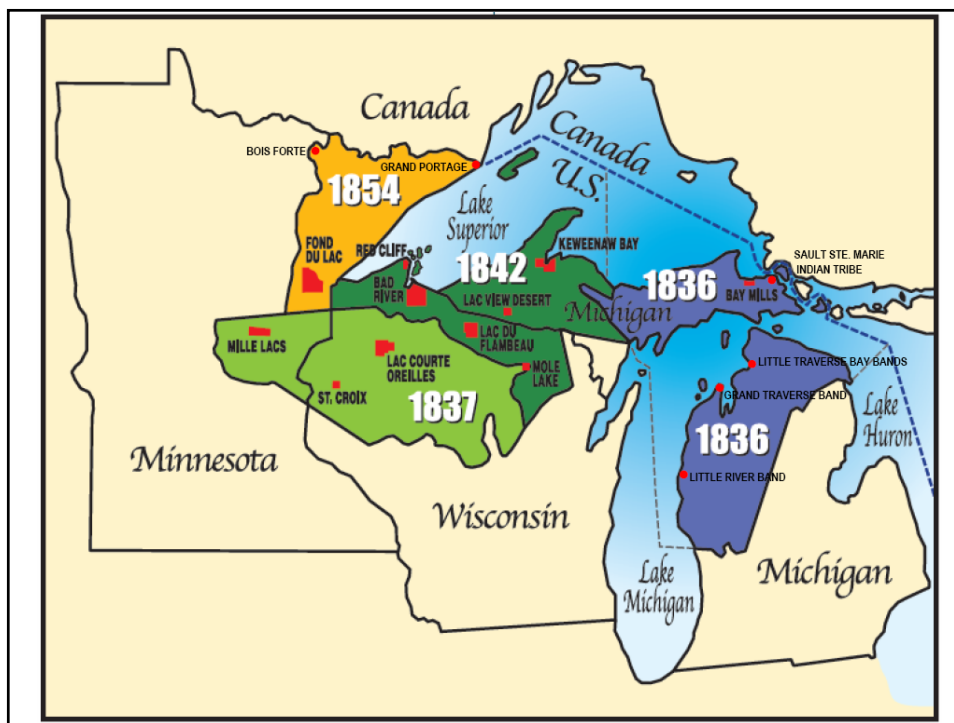
¹ based on 2000 U.S. Census

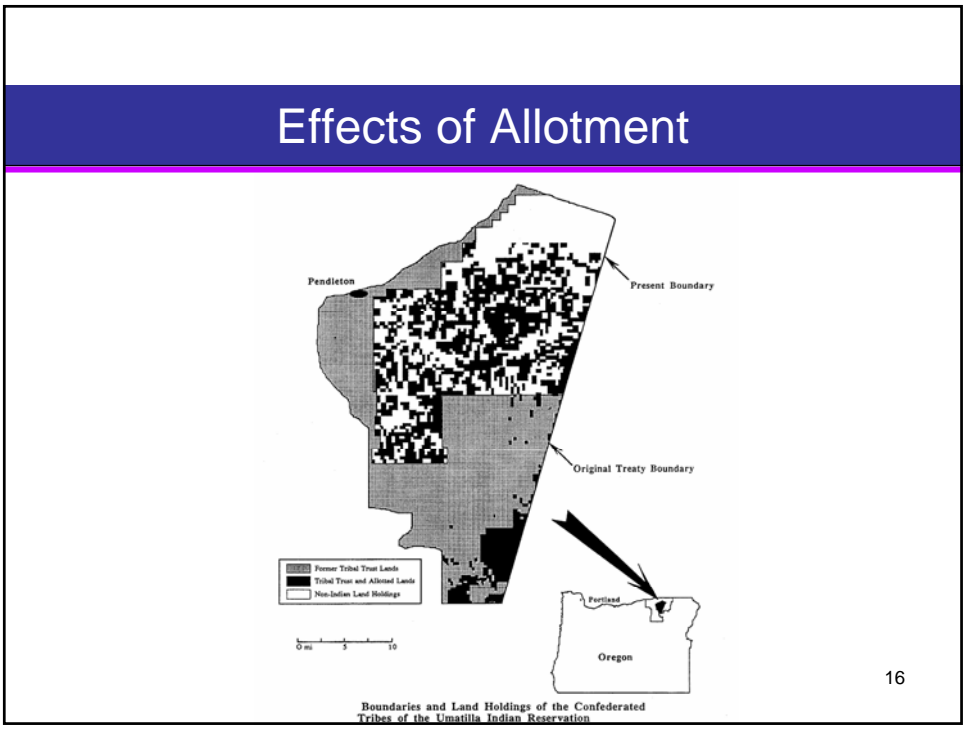
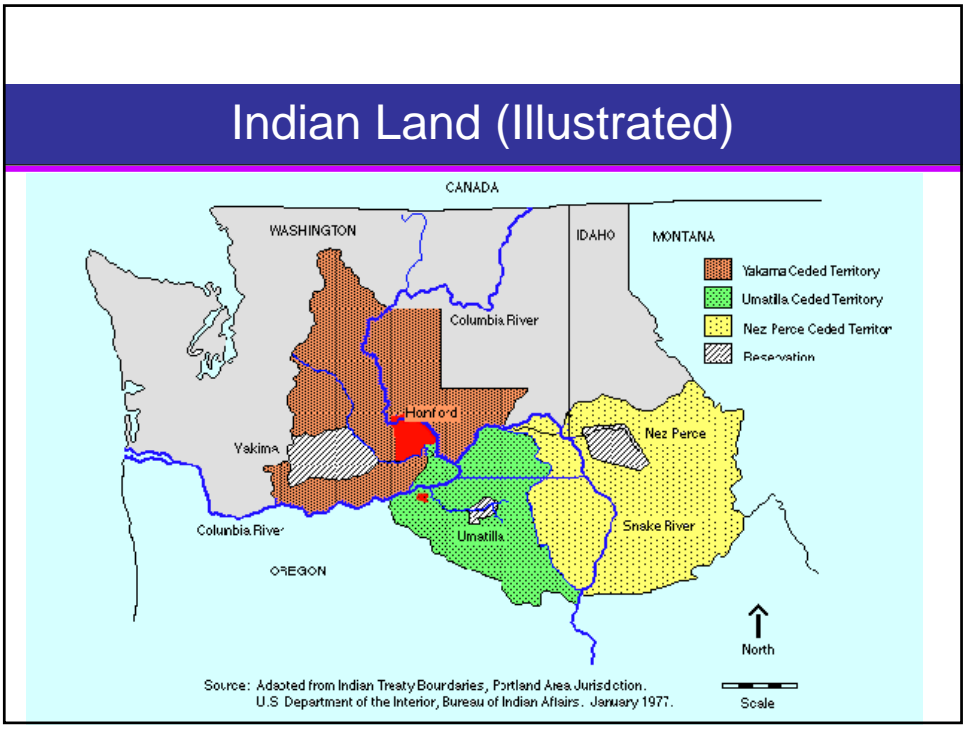
12

Key Concepts

- **Non-Indian Fee Land In Indian Country**
 - Some States want to implement environmental programs for non-Indian fee lands in Indian country
- **Alaska**
 - No “Indian Country” In AK
(except Metlakatla Indian Community, Annette Island)
- **Oklahoma**
 - Trust and restricted fee allotments are “Indian country”
 - Generally, Tribal fee lands outside Indian country are under State authority (special circumstances apply)

13





History of Federal Indian Policy

- Series of dramatic reversals, each with specific consequences
- Not all groups experienced the same effects from each policy period
- Policy Impacts – the Bottom Line:
 - Dramatic reduction to land and natural resource base
 - Reduced population and traditional forms of governance
 - More than half of all Indian people today live off-reservation, where they constitute the poorest of ethnic minority categories
 - Tribes today potentially control substantial resources, but
 - Economic development still depends largely on transfers

17

Six Main Federal Policy Periods

- European Arrival, Colonies (1492-1788)
- Removal and Relocation (1789-1849)
- Pacification and Reservation (1849-1887)
- Allotment and Assimilation (1887-1934)
- Reorganization (1934-1948)
- Termination (1948-1972)
- Self-Determination (1972 – present)

18

Removal (1789 – 1849)

- Remove Indian people from desirable settlement areas and valuable resource bases, in the name of the “public interest”
 - US constitution ratified, explicitly assigns Federal authority over Indian Affairs (1789)
 - Implementation of federal authority through series of Trade and Intercourse Acts (first in 1790)
 - Cherokee Constitution adopted (1827)
 - US Supreme Court decides “Cherokee” cases, clarifying tribal status as “domestic dependent nations” and defining federal trust responsibility (1831-1832)
 - Nearly 20,000 people forcibly removed from southeastern woodlands to the Indian Territory (Oklahoma) on “Trail of Tears” (1838)

19

Pacification & Reservation (1849-87)

- Protect encroaching settlers from Indian people attempting to retain their land, and obtain land cessions for non-Indian settlement
 - Transfer of Indian Affairs from War Department to Interior Department
 - Period of most active treaty-making
 - Stevens Treaties affecting status of lands encompassing most of the Pacific Northwest, including the Umatilla Depot Activity and Naval Station Puget Sound
 - Fort Bridger Treaty with Shoshone-Bannock Tribes
 - Treaty of Ruby Valley (of interest in the Hawthorne Depot and test ranges in Nevada)
 - Grant’s Post-Civil War “Peace Policy” and missionary control
 - Congressional Treaty-Making authority rescinded (1871), Executive Order and Statutory recognition of tribal status continues

20

Allotment & Assimilation (1887-1934)

- Make remaining Indian lands available to non-Indian settlers and assimilate Indian people into “Mainstream” America
 - General Allotment Act (Dawes Act) of 1887:
 - Reservations ranked according to “readiness” (i.e., desirability), so some never allotted
 - 160 acres to each household head, smaller amounts to minors; “surplus” placed in public domain and either sold to railroads and settlers or placed under control of the Agriculture or Interior Departments
 - Indian allotments held in trust for 20-year period, while allottees expected to acquire appropriate skills
 - 100 million acres of Indian land lost to non-Indians through “surplus” sales or tax forfeitures between 1887-1934
 - “Checkerboard” land holdings (and land use planning, development, and public safety jurisdiction difficulties) direct result of allotment
 - US Supreme Court *Winters* ruling (1906) regarding tribal water rights
 - Indians granted US citizenship as reward for WWI valor (1924)
 - Brookings Institute (“Meriam”) policy assessment (1928)

21

Reorganization (1934 – 1948)

- Reorganization of administrative apparatus
 - Reconstituted tribal governing bodies
 - Wider distribution of federal programs
 - Reverse assimilationist trends, especially through educational reforms
 - Protect tribal natural resource base
- Indian Reorganization Act passed, beginning “Indian New Deal” (1934)
- Johnson-O’Malley Act (Education Reform) (1936)

22

Termination (1948 – 1972)

- End trusteeship relationship and assimilate tribal populations
 - Reduce Federal cost in wake of WWII debts; Break up remaining tribal land base; Relocate reservation residents
 - Reallocate Federal authority away from BIA and, in some instances, to State governments
- US Land Claims Commission Established (1948)
- Hoover Commission Report, Policy Assessment (1949)
- House Concurrent Resolution 108, formal adoption of “Termination” as policy (1953)
- PL 280 unilaterally assigns state civil and criminal jurisdiction (1953)
- IHS becomes a part of the US Public Health Service (1954)
- Klamath and Menominee Termination (1954)
- Leasing Act (1955)
- Indian Bill of Rights passed as part of Civil Rights Act of 1968
- Alaskan Native Claims Settlement Act (1971)

23

Self-Determination (1972 – Present)

- Acknowledge remaining elements of tribal sovereignty, and tribes’ right to control their own destiny; need for capacity-building through educational support, natural resource protection authority, and economic restructuring

24

Self-Determination (continued)

- Indian Self-Determination and Education Act (1972)
- “Boldt-1” Decision; Office of Native American Programs established (1974); “Boldt-2” decision (1980)
- American Indian Policy Review Commission established (1975)
- American Indian Religious Freedom Act (1978)
- Menominee Trustee status restored (1978)
- Indian Tribal Government Tax Status Act (1982)
- Reagan (1983), Bush (1991), Clinton (1994), and Bush (2004) Policy Statements

25

Self-Determination (continued)

- Indian Environmental Regulatory Enhancement Act authorizes grant funding of up to 80% of planning, development and implementation costs for regulatory improvements (1990)
- Executive Order on Environmental Justice 12898 applies to Native American Programs (1994)
- Native American Sacred Sites Executive Order 13007 authorizes site access, when feasible (1996)
- Tribal Colleges and Universities Executive Order 13021 provides 5-year planning guidance to agencies (1996)
- Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments (2000)

26

Tribal Government Finances

- Tax revenues generally not available to fund tribal government operations.
- Gaming profits restricted to a few tribes.
- Land held "in trust" leads to difficulty in securing credit for long-term capital investment.
- Without other sources for operations or capital improvements, tribes must rely heavily on interagency fund transfers.
- Fund transfers are notoriously unstable. They provide a poor planning basis.
- With uncertain long-term support, tribes have difficulty recruiting and retaining staff, improving infrastructure, and attracting investment for economic development initiatives.

27

Federal Trust Responsibility

- Establishes & protects the rights of tribes and individual Indian people
- Defines the required standard of conduct for Federal officials & for the Congress
- A standard against which to measure Federal action toward Indians, as expressed in Treaties, Agreements, Statutes, Executive Orders, and Administrative Regulations

28

Direct Implementation by EPA In Indian Country

- **Generally, States do not have authority in Indian country**
- **EPA must “implement directly Federal environmental programs required or authorized by law in the absence of an acceptable tribal program.”**
 - FY 2001 Approp. Bill; P.L. 106-377, 114 Stat. 1441 (2000)



29

Tribal Regulatory Authority

- **Treatment in a manner similar to a state (“TAS”)**
- **Treatment of tribes varies under different statutes**
- **EPA can authorize tribal programs under:**
 - Safe Drinking Water Act (SDWA)
 - Clean Air Act (CAA)
 - Superfund (CERCLA)
 - Clean Water Act (CWA)
- **Tribes have a major role in TSCA, FIFRA and EPCRA**
- **Supreme Court's pivotal Montana Test**
to determine whether tribal regulatory powers extended to nonmembers' fee lands activities: (1) is there a "consensual relationship" between the nonmember and the tribe; or (2) whether the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

30

EPA Indian Policy (1984)

EPA was the first federal agency to adopt a formal Indian Policy

Guiding Principles

- 1) Work proactively and directly with Indian tribes (“govt.-to-govt.”).
- 2) Recognize the sovereignty of tribal governments to set standards, make policy decisions, and manage reservation programs.
- 3) Encourage and assist tribes to take regulatory and program management responsibilities for reservation lands.

31

EPA Indian Policy (1984)

EPA was the first federal agency to adopt a formal Indian Policy

Guiding Principles (cont)

- 4) Identify and remove existing legal and procedural impediments to working effectively with tribes
- 5) Ensure that tribal concerns and interests are considered whenever actions may affect reservation environments.
- 6) Encourage cooperation between tribal, state, and local governments.

32

EPA Indian Policy (1984)

EPA was the first federal agency to adopt a formal Indian Policy

Guiding Principles (cont)

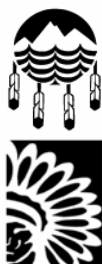
- 7) Enlist other federal agencies with related responsibilities on Indian reservations to support cooperative efforts.
- 8) Ensure compliance with environmental statutes and regulations on Indian reservations.
- 9) Incorporate these principles into planning and management activities, and ongoing policy and regulation development processes.

33

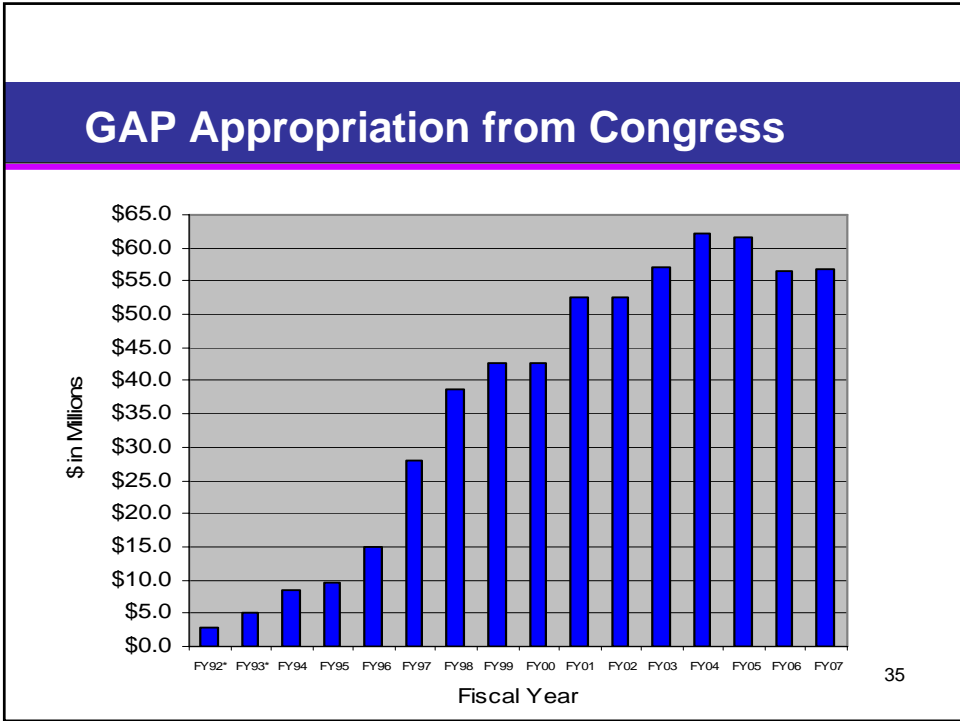
Organization of EPA's Indian Program

Partnerships:

- **Tribal Caucus of EPA's Tribal Operations Committee (TOC)**
- 19 Tribal leaders & EPA Senior Leaders
- **Tribal Science Council, Pesticide Program Council, etc.**
- **Other Federal Agencies**
- **National & Regional Tribal Organizations**



34



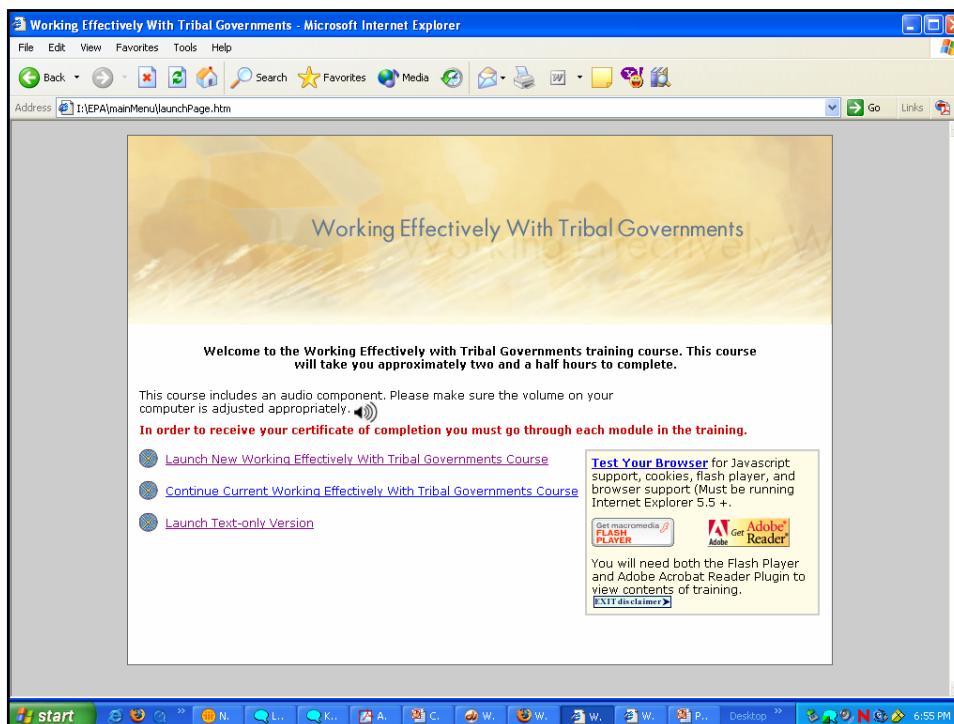
Goal 5, Objective 5.3: Build Tribal Capacity

EPA's Strategic Plan Contains Commitments for Environmental Progress In Indian Country

Through 2008, assist all federally recognized tribes in:

- Assessing the condition of their environment,
- Building their capacity to implement environmental programs, and
- Implementing environmental programs.

36



Factors for Successful Intergovernmental Administration Involving Tribes

- 1) Respect Tribal Sovereignty & Jurisdiction
- 2) Acknowledge Off-Reservation Tribal Rights
- 3) Negotiate Intergovernmental Agreements
- 4) Train Federal, State, Local, and Tribal government Employees on Intergovernmental Administration

Factors for Successful Consultation with Tribal Governments

- Do Your Homework
- Pick the Right Person for the Job
- Consult Government-to-Government
- Know Who You are Talking To
- Negotiate Protocol
- Consult Early and Often
- Be Patient
- You Get What You Pay For
- Document the Process
- Don't Promise What You Can't Deliver
- Follow Through
- Evaluate and Re-Evaluate
- Keep Out of Tribal Politics

Source: McKeown, C. Timothy; "Principles of Consultation." *Common Ground: Archeology and Ethnography in the Public Interest*. Vol. 2, No's 3&4. Summer/Fall, 1997 (pp. 26/27).

39